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10 **UNITED STATES DISTRICT COURT FOR THE**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **San Jose Division**

13 DEBRA SHEARWATER, STEPHEN A. THAL, )  
14 MICHAEL DEE, DR. CAROLYN CROCKETT, )  
15 ROBERT M. FERRIS, and AMERICAN BIRD )  
16 CONSERVANCY, )

17 Plaintiffs, )

18 v. )

Civ. No. 5:14-cv-02830-LHK

19 DAN ASHE, Director, United States Fish and )  
Wildlife Service; SALLY JEWELL, Secretary, )  
20 United States Department of the Interior, )

21 Defendants, )

22 and )

23 AMERICAN WIND ENERGY )  
ASSOCIATION )

24 Defendant-Intervenor. )

25  
26 **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO FEDERAL**  
27 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN**  
**SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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1 The narrow, albeit crucial, issue in this case is whether the Defendant Fish and Wildlife  
 2 Service (“FWS”) must at least *analyze* the potential impacts of the thirty-year eagle take rule  
 3 pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370f, and  
 4 section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536. Because the rule is  
 5 expressly *designed* to have a significant impact on the environment by encouraging the  
 6 development of wind power and other projects in the habitat of bald and golden eagles – species  
 7 protected by the Bald and Golden Eagle Protection Act (“BGEPA”), 16 U.S.C. §§ 668-668d –  
 8 FWS’s invocation of a Categorical Exclusion (“CE”) to avoid preparation of an Environmental  
 9 Impact Statement (“EIS”) or even a more limited Environmental Assessment (“EA”) is contrary to  
 10 law and arbitrary and capricious. Nor did Defendants analyze, at all, the potential effects of the  
 11 rule on endangered and threatened species that share the same habitat as eagles.

12 In 2009, the FWS concluded that the maximum duration of BGEPA permits must be  
 13 limited to five years to safeguard bald and golden eagles. The *only* thing that has changed since  
 14 then is that the wind power industry said that it needed thirty-year permits and the FWS acceded  
 15 without even analyzing the impact of that change in accordance with NEPA and the ESA. The  
 16 Federal Defendants do *not* dispute that the new rule was intended to affect the environment by  
 17 accommodating the desires of the wind power industry. To the contrary, Defendants concede that  
 18 the purpose of the rule was to “*encourage applications for permits*” to kill or otherwise “take”  
 19 bald and golden eagles, “by extending the permit term in the Take Rule *to better match the*  
 20 *operating lifetime of wind-energy facilities.*” Def. Mem. at 7 (emphasis added).<sup>1</sup>

21 Defendants’ belief that this highly controversial policy change – opposed by the FWS’s  
 22 own experts as well as the National Park Service (“NPS”), environmental and wildlife protection  
 23 groups, and Native American tribes – “will facilitate the *responsible* development of renewable  
 24 energy” in eagle habitat, *id.* (quoting AR 1), cannot justify Defendants’ failure to take a “hard  
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26 <sup>1</sup> The brief of the American Wind Power Association (“AWEA”) largely reiterates the  
 27 government’s arguments. To the limited extent that it does not, Plaintiffs are today also filing a  
 28 separate opposition to AWEA’s arguments.

look” – or *any* look – at the *impacts* of the rule change in a NEPA document or in section 7 consultation. As explained in Plaintiffs’ opening brief (with no rebuttal from Defendants), the Council on Environmental Quality (“CEQ”) regulations implementing NEPA instruct that environmental impacts necessitating preparation of an EIS may be “both beneficial and adverse,” and that a “significant effect may exist *even if the Federal agency believes that on balance the effect will be beneficial.*” 40 C.F.R. § 1508.27(b)(1) (emphasis added). Hence, courts do not excuse agencies from preparing NEPA documents on the basis of their policy preferences.<sup>2</sup> Likewise, the section 7 process must be invoked for any federal agency action that “*may* affect listed species or critical habitat” in any manner. 50 C.F.R. § 402.14(a) (emphasis added).

In short, Defendants’ assertion that they adopted the rule to facilitate the “responsible development” of wind power projects in bald and golden eagle habitat, and to “stri[k]e a balance between providing certainty to project proponents and protecting eagles,” AR 9 (final rule), fails to absolve Defendants of the obligation to analyze impacts under NEPA and section 7, and instead does the opposite; it establishes that these legal requirements *must* be satisfied for a policy decision of this magnitude. NEPA “place[s] upon an agency the obligation to consider every significant aspect of the environmental impact” of a policy choice, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978), and to do so “as part of the agency’s process of deciding whether to pursue a particular action.” *Balt. Gas and Elec. Co., v. Natural Res. Def. Council*, 462 U.S.87, 100 (1983). Similarly, a central function of ESA section 7’s consultation mandate is to ensure, with regard to “any discretionary action that may affect a listed species or critical habitat,” that agencies take those impacts into consideration *before* taking

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<sup>2</sup> See, e.g., *Catron Cnty. Bd. of Comm’rs, N.M. v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) (“[T]hat the Secretary believes the effects of a particular designation to be beneficial is equally immaterial to his responsibility to comply with NEPA. ‘[E]ven if the Federal agency believes that on balance the effect [of the action] will be beneficial,’ regulations promulgated by the [CEQ] nonetheless require an impact statement.”) (quoting 40 C.F.R. § 1508.27(b)(1)); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1197 (N.D. Cal. 2014) (“This argument is, in essence, that the benefits of the [agency action] will outweigh any adverse effects. The problem with this argument is that, ‘[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.’”) (quoting 40 C.F.R. § 1508.27(b)(1)).



1 such action. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en  
2 banc).

3 Accordingly, the Court should vacate and remand the rule for compliance with the  
4 mechanisms that Congress established for agency decisions of this kind. Initially, however,  
5 Plaintiffs will explain why Federal Defendants’ standing objection is groundless.

## 6 **I. PLAINTIFFS HAVE STANDING**

7 To establish standing, a plaintiff must (1) suffer an “injury in fact”; (2) there “must be a  
8 causal connection between the injury and the conduct complained of”; and (3) the “injury has to be  
9 fairly . . . traceable to the challenged action of the defendant . . .” *Lujan v. Defenders of Wildlife*,  
10 504 U.S. 555, 561 (1992) (internal quotation omitted). At the summary judgment stage, the  
11 plaintiff “must set forth by affidavit or other evidence specific facts . . . which for purposes of the  
12 summary judgment motion will be taken to be true.” *Id.* (internal quotation omitted). The Court  
13 “need not address the standing of each plaintiff if [the Court] conclude[s] that any plaintiff has  
14 standing.” *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep’t of the*  
15 *Interior*, 767 F.3d 781, 789 (9th Cir 2014). Here, Plaintiffs have filed six standing Declarations,  
16 which are more than sufficient to establish standing under applicable precedents.

### 17 **A. Plaintiffs’ Procedural Injury Claims Are Sufficient For Standing.**

18 Where, as here, Plaintiffs contend that the FWS has violated procedural obligations under  
19 NEPA and the ESA, Plaintiffs can establish injury in fact so long as they can demonstrate that the  
20 violation “could impair a separate concrete interest of theirs,” *Defenders of Wildlife*, 504 U.S. at  
21 572 – such as a concrete interest in wildlife observation. *Id.* at 562-63 (“Of course, the desire to  
22 use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable  
23 interest for purposes of standing.”). Further, the Supreme Court has held that a plaintiff with a  
24 “concrete interest” can complain about an agency’s failure to comply with a required procedure,  
25 such as the failure to prepare an EIS, “without meeting all the normal standards for redressability  
26 and immediacy” that would otherwise apply, *id.* at 573 n.7 (explaining that someone who may be  
27 harmed by a federally licensed dam “has standing to challenge the licensing agency’s failure to  
28 prepare an [EIS], even though he cannot establish with any certainty that the statement will cause  
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1 the license to be withheld or altered, and *even though the dam will not be completed for many*  
 2 *years*”) (emphasis added).<sup>3</sup>

3 Plaintiffs have met these requirements. For example, Plaintiff Debra Shearwater, a  
 4 resident of Hollister in Benito County, California and a member of Plaintiff American Bird  
 5 Conservancy (“ABC”), explains that she has been observing golden eagles since moving to  
 6 California in 1976 and that she “purchased [her] current home specifically to observe Golden  
 7 Eagles on a near-daily basis.” ECF No. 52-1 ¶ 2. She also states:

8 I have enjoyed observing eagles throughout the region, particularly during my  
 9 regular relaxation drives through Santa Ana Valley . . . I also document and track  
 10 nesting pairs of Golden Eagles throughout the region. In 2004, I discovered the  
 11 first-ever breeding Bald Eagles in San Benito County, just seven miles from my  
 12 home. Ever since, I have reported annually to the local Bald Eagle expert regarding  
 the pair’s nesting success . . . In addition, I have recently documented nesting Bald  
 Eagles at Hernandez Reservoir, San Felipe Lake, the Gabilan Mountains, and very  
 likely San Justo Reservoir, all of which are within San Benito County.

13 *Id.* ¶ 3. Ms. Shearwater further explains that “[i]n addition to Bald and Golden Eagles, I also  
 14 enjoy observing other animal species whose habitats overlap with those of eagles” and that are  
 15 protected by the ESA, such as the “San Joaquin Kit Fox, the Blunt-Nosed Leopard Lizard, the  
 16 Giant Kangaroo Rat, and the California Condor.” *Id.* ¶ 5.

17 Ms. Shearwater’s Declaration also explains that, insofar as the thirty-year take rule is  
 18 “expressly intended to encourage the development of wind energy and other renewable energy  
 19 projects in areas occupied by eagles, by providing these projects with eagle ‘take’ permits lasting  
 20 up to three decades . . . including in California, this will significantly impair [her] ability to  
 21 observe, enjoy, and study these beautiful creatures in the wild,” *id.* ¶ 6. The rule is “also likely to  
 22 impair [her] ability to observe and enjoy federally endangered species whose habitats overlap with  
 23  
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25 <sup>3</sup> See also *California ex rel. Imperial Cty. Air Pollution Control Dist.*, 767 F.3d at 789-90 (a  
 26 plaintiff asserting a violation of a required procedure need only establish that the agency “violated  
 27 procedural rules designed to protect their concrete interests, and that the challenged action will  
 28 threaten those interests”); *id.* (“For procedural rights, ‘our inquiry into the imminence of the  
 threatened harm is less demanding.’”) (internal quotation omitted).

1 that of bald and golden eagles and that will be adversely affected by the expansion of industrial  
2 activities in eagle habitat that the rule is intended to encourage.” *Id.* ¶ 7.

3 Ms. Shearwater’s declaration also details how the FWS’s NEPA violations threaten her  
4 concrete interests in eagles:

5 [t]he FWS’s promulgation of the thirty-year eagle take rule without any review of  
6 the rule’s environmental impacts under NEPA – through preparation of an [EIS] or  
7 at least an [EA] – is extremely detrimental to my interests in enjoying, observing,  
8 and studying eagles. Such NEPA review would at least be required to analyze the  
9 potential cumulative effects on eagles of facilitating and encouraging the expansion  
10 of wind power and other projects in eagle habitat, as well [as] consider alternatives  
11 to the FWS’s ill-advised decision to dramatically increase the duration of BGEPA  
12 permits notwithstanding the Service’s admission that there is a dearth of crucial  
information, particularly with regard to the status and vulnerability of golden eagle  
populations. An appropriate NEPA analysis would compel the FWS to compile  
and analyze additional information, which would be of great value to me and others  
who derive tremendous benefits from eagles, and who also endeavor to study and  
advocate for them.

13 *Id.* ¶ 10; *see also id.* ¶ 8 (the rule “also eliminates my opportunity to participate in permit renewal  
14 processes for wind power and other major projects that will kill or otherwise harm eagles”;  
15 “authorizing BGEPA permits to be issued for three decades directly and irreparably undermines  
16 my ability to effectively and meaningfully advocate for eagles and eagle populations (and other  
17 wildlife) in areas I regularly visit”). As for ESA-listed species, Ms. Shearwater’s Declaration  
18 states that “because the FWS refused to engage in any ESA section 7 consultation analyzing the  
19 potential impacts of the rule on ESA-listed species and their dwindling habitats, the rule is very  
20 likely to adversely affect [her] recreational and other concrete interests” in the California Condor  
21 and the other ESA-protected species whose habitats overlap with those of eagles. *Id.* ¶ 7.

22 The other individual plaintiffs, who are also avid naturalists and members of ABC with  
23 longstanding recreational, professional, and other concrete interests in eagles, likewise document  
24 in their declarations how the rule threatens those interests.<sup>4</sup> In turn, the Declaration submitted by  
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26 <sup>4</sup> See Declaration of Michael Dee (ECF No. 52-4) ¶¶ 2-4 (explanation by the former General  
27 Curator of the Los Angeles Zoo that he has “had the opportunity to work with a number of species  
28 of eagles,” including bald and golden eagles,” that he now “spend[s] a considerable amount of  
time observing eagles and other bird species during [his] personal travels,” and that the rule will  
(footnote continued)

1 ABC's Vice President for Conservation Advocacy explains that the rule impairs the interests of  
 2 these and other ABC members "by encouraging the development of industrial wind power and  
 3 other projects in areas occupied by Bald and Golden Eagles" as well as ESA-protected species.  
 4 Declaration of Darin C. Schroeder (ECF No. 52-2) ¶ 5; *id.* ¶ 6 ("[w]ind power projects built in  
 5 eagle habitat have been documented as being highly dangerous to eagles, with confirmed deaths at  
 6 various projects throughout the country, including in California"); *id.* ¶¶ 7, 12 (the "expansion of  
 7 industrial wind power projects in eagle habitat, as anticipated and encouraged by the rule, will also  
 8 adversely affect other species that share the habitat of eagles and that ABC members observe and  
 9 study for recreational purposes and professional reasons," including the "California Condor, the  
 10 Lesser Prairie Chicken, and Sprague's Pipit").<sup>5</sup>

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12 "result in substantial industrial projects within eagle habitat, causing the loss of a significant  
 13 number of bald and golden eagles and impairing eagle populations, thus harming [his] ability to  
 14 observe and enjoy" eagles, "including in the specific areas in which [he and his] family have  
 15 enjoyed observing eagles for many years"); Declaration of Carolyn Crockett, PhD (ECF No. 52-3)  
 16 ¶¶ 2-5 (explaining that she has studied eagles and routinely sees them in her "Seattle neighborhood  
 17 of Haller Lake and in surrounding communities in the Puget Sound region," that bald eagles are  
 18 her favorite bird to see in the wild, and that the rule impairs her "concrete interests in Bald and  
 19 Golden Eagle conservation by effectively eliminating [her] ability and the ability of conservation  
 20 organizations [she] support[s] to participate and comment in the permit renewal process and, thus,  
 21 [her] opportunity to advocate on behalf of eagles"); Declaration of Stephen A. Thal (ECF No. 52-  
 22 5) at ¶¶ 1-4 (explanation by resident of Kentfield, California, who has served on the boards of  
 23 Audubon Canyon Ranch and the Point Reyes Bird Observatory, that "[e]very year for the past  
 24 thirty years, [he has] taken friends to the Sacramento Refuge near Willows, California, to observe  
 eagles and other birds during the winter months," a practice he will "continue as long as [he is]  
 able," that he also "observe[s] Bald and Golden Eagles in the Lake Tule Refuge, the Lower  
 Klamath Refuge, and the Upper Klamath Refuge on the border of California and Oregon," and  
 that the thirty-year eagle take rule will "inevitably harm [his] interests in observing eagles by  
 resulting in the killing and injuring of individual eagles and by jeopardizing eagle populations in  
 locations where [he has] observed eagles for many years"); Declaration of Robert M. Ferris (ECF  
 No. 52-6) ¶¶ 1-4 (explanation by professional wildlife biologist, who has enjoyed observing eagles  
 "for more than forty years" and who "regularly observe[s] eagles from the rear deck of [his]  
 house" in Bellingham, Washington," that the rule is "likely to adversely impact [his] recreational  
 activities and eagle watching," and that the rule "eliminates the opportunity for the public to have  
 meaningful input into whether permits should be maintained, modified, or revoked").

<sup>5</sup> That Defendants disagree with Plaintiffs' arguments concerning the rule has no bearing on  
 Plaintiffs' standing. *See Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 441 (D.C. Cir. 1998)  
 (en banc) ("A party need not *prove* that the agency action it attacks is unlawful . . . in order to have  
 standing to level that attack.") (internal quotation omitted) (emphasis in original); *Coho Salmon v.*  
*Pac. Lumber Co.*, 61 F. Supp. 2d 1001, 1013 (N.D. Cal. 1999) ("Whether a plaintiff has a legally  
 protected interest (and thus standing) does not depend on whether he can demonstrate that he will  
 succeed on the merits.") (citing *Glickman*, 154 F.3d at 441).

**B. Defendants’ Objections To Plaintiffs’ Procedural Injury Claims Are Baseless.**

In arguing that none of the Plaintiffs has standing, Defendants not only largely disregard Plaintiffs’ Declarations, but they also ignore controlling Circuit precedent as well as their own oft-stated rationale for the rule. Defendants assert that “Plaintiffs merely speculate that the Tenure Amendment – as opposed to the original Take Rule – *might* encourage development of wind projects,” Def. Mem. at 12 (emphasis added). But the very *purpose* of the rule, as stated in the final rule’s preamble and repeated at every step in the process leading to its issuance, is to “*facilitate the development of renewable energy and other projects that are designed to be in operation for many decades*” in eagle habitat, by removing an “*impediment for activities or projects that will last more than 5 years.*” AR 5, 18 (final rule) (emphasis added); *see* Plaintiffs’ Opening Memorandum (“Pl. Mem.”) at 15 n.8 (collecting record citations).

Lest there be any remaining doubt about whether the wind power industry itself regards the rule as paving the way for a plethora of new projects in eagle habitat that otherwise would not come to fruition, it is dispelled by the Declaration submitted by intervenor AWEA when it moved for party status. The Declaration states that “AWEA and its members believe that this extension” – i.e., “extend[ing] the maximum duration of a programmatic permit for the incidental take of eagles from five (5) to thirty (30) years” – “*is necessary for the future of wind energy development*” in areas occupied by eagles. ECF No. 33-1 (Declaration of John M. Anderson) ¶¶ 6, 7 (emphasis added). AWEA’s declarant further explains that “[*b*]ecause occasional, unintentional eagle mortality is an unavoidable reality for wind energy facilities” constructed in eagle habitat:

AWEA’s member’s [sic] financing of projects, which are in service for well over five years *would be severely threatened* without a guarantee of renewal of projects for a term greater than five years and/or significantly changed permit conditions upon renewal if granted. *The current Eagle Permit Tenure Rule has materially decreased the uncertainty facing wind energy facilities that may occasionally result in eagle fatalities, because it gives developers more long-term certainty that a wind energy facility will retain permit authorization throughout its serviceable life.* In addition, the Eagle Permit Tenure Rule reduces the possibility that a facility might face unanticipated mitigation costs late in its life after the facilities’ economics have been fixed.

*Id.* ¶ 9 (emphasis added).



1 It is understandable that the wind power industry desires decades-long environmental  
 2 permits and the “materially decreased” uncertainty that goes along with them. *Id.* ¶ 9. Indeed,  
 3 the industry’s interest in expanding in places where bald and golden eagles will “unavoidabl[y]”  
 4 be killed by wind turbines, *id.* ¶ 7 (emphasis added) – a criminal violation of federal law without a  
 5 BGEPA permit – is what indisputably prompted adoption of the rule, and also what afforded  
 6 AWEA a sufficiently concrete interest to intervene in this case. On the other side of the coin,  
 7 those with concrete interests in observing, studying, and otherwise enjoying bald and golden  
 8 eagles – and whose interests are therefore placed at grave risk *by the very same regulatory change*  
 9 for which the industry argued so vociferously – must have Article III standing to press their claims  
 10 of noncompliance with essential procedural safeguards embodied in NEPA and the ESA. *See*  
 11 *Monsanto Co v. Geertson Seed Farms*, 561 U.S. 139, 153-54 (2010) (organic farmers had standing  
 12 to assert a NEPA violation in connection with the government’s deregulation of genetically altered  
 13 alfalfa because they sought to “avert the risk of gene flow to their crops”); *cf. Duke Power Co. v.*  
 14 *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 (1978) (holding that plaintiffs had standing to  
 15 challenge the constitutionality of a statute that was designed to facilitate the construction of  
 16 nuclear power plants that, if built, would emit “non-natural radiation into [their] environment”).<sup>6</sup>

17 Equally untenable is Defendants’ contention that Plaintiffs cannot establish standing  
 18 without pointing to a “specific project that was planned for an area that they used.” Def. Mem. at  
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20  
 21 <sup>6</sup> Defendants’ implication that Plaintiffs lack standing because the rule under challenge “only  
 22 allow[s] an operator a defense to liability should operations of a facility ‘take’ an eagle,” Def.  
 23 Mem. at 12, is a non-starter, especially in view of AWEA’s concession (and the administrative  
 24 record’s confirmation) that unpermitted projects built in eagle habitat will “unavoidably” kill  
 25 eagles in violation of federal law. “Supreme Court precedent establishes that the causation  
 26 requirement for constitutional standing is met when a plaintiff demonstrates that the challenged  
 27 agency action authorizes the conduct that allegedly caused the plaintiff’s injuries, *if that conduct*  
 28 *would allegedly be illegal otherwise.*” *Glickman*, 154 F.3d at 440 (emphasis added) (citing *Simon*  
*v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976); *Japan Whaling Ass’n v. Am. Cetacean*  
*Soc’y*, 478 U.S. 221, 231 n.4 (1986)). Because the government concedes that project operators  
 need a “defense to liability” when their projects kill or otherwise “take” eagles – i.e., that such  
 conduct would be unlawful in the absence of the authorization the thirty-year take rule was created  
 to provide – it necessarily follows that those whose interests are directly threatened by that action  
 have standing to challenge its legality. *Id.*

12. Indeed, that precise argument has been soundly and repeatedly rejected by the Court of Appeals in the context of procedural injury claims such as those pressed by Plaintiffs here.<sup>7</sup>

In *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961 (9th Cir. 2003), the plaintiffs challenged a new national forest management policy based on claims that the Forest Service had failed to comply with the procedural requirements of NEPA and the ESA. Although the plaintiffs, as here, had submitted “numerous affidavits” identifying specific locations where they “observe nature and wildlife,” and they alleged that these places would be subjected to “added risk” by virtue of the agency’s failure to comply with NEPA and the ESA, the government contended that the plaintiffs could not challenge the rule because its “environmental impact is indirect” and would not be felt until it was implemented through the development of further “site-specific” decision documents. *Id.* at 971-73.

The Court of Appeals dismissed that argument, reasoning that “[o]ur precedent compels us to conclude otherwise,” *id.* at 973, and that in a procedural injury case like this one the “imminence or lack thereof of site-specific action is simply a factual coincidence, rather than a basis for legal distinction,” *id.* at 977. The court explained that, in a series of cases, the Ninth Circuit had established that plaintiffs with concrete interests in wildlife observation and enjoyment of nature who sought to challenge regulations or other broad agency planning documents on the grounds that the agency had violated NEPA or other required procedures did *not* need to “‘point to the precise area . . . where the injury will occur.’” *Id.* at 974 (quoting *Res. Ltd. v. Robertson*, 35 F.3d 1300, 1303 (9th Cir. 1993)); *see also W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 484-85 (9th Cir. 2011) (the plaintiff had standing to bring NEPA and ESA section 7 claims challenging agency regulations that “decreased public involvement in public lands management,”

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<sup>7</sup> The factual premise of Defendants’ argument is also wrong since, in reliance on the thirty-year take rule, projects are *already* being “planned” that will affect eagles in the areas Plaintiffs use for eagle observation, study, and enjoyment. For example, six days before Defendants filed their brief, the FWS published in the Federal Register a notice that Pacific Gas and Electric Company is pursuing a “30-year programmatic eagle take permit for take of bald and golden eagles” for a vast area encompassing fifty-four counties in California, including San Benito County, *see* 80 Fed. Reg. 24955-56 (May 1, 2015), where Ms. Shearwater regularly observes, studies, and otherwise enjoys eagles as well as ESA-listed species that share eagle habitat. *See supra* at 4-5.

1 although the regulations had not yet been applied to any specific parcels of concern to the  
 2 plaintiffs); *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003) (plaintiffs had  
 3 standing to challenge a proposed plan and programmatic EIS regarding the management of  
 4 California Bay-Delta water resources; “when, as here, a procedural violation is the injury alleged,  
 5 the requirements of immediacy of the threatened harm are relaxed . . . . Thus, the fact that Plaintiff  
 6 cannot show immediate harmful action will be taken based on the allegedly defective EIS is not  
 7 fatal to establishing standing”).<sup>8</sup>

8 Consistent with these rulings, the Supreme Court has declared that individuals who would  
 9 otherwise have standing to sue and who are therefore “injured by a failure to comply with the  
 10 NEPA procedure *may complain of that failure at the time the failure takes place*, for the claim can  
 11 never get ripper.” *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 737 (1988) (emphasis added).  
 12 That reasoning has been expressly adopted by the Court of Appeals in holding that where, as here,  
 13 an agency has purportedly failed to comply with NEPA or section 7 of the ESA in the course of  
 14 making a programmatic decision that threatens the interests of the plaintiffs, such a dispute is “ripe  
 15 for adjudication” without awaiting site-specific application. *Kraayenbrink*, 632 F.3d at 486; *see*  
 16 *also California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009) (the  
 17 plaintiffs could pursue an immediate NEPA-based challenge to a nationwide regulation governing  
 18 the process for protecting roadless areas because the “plaintiffs are taking advantage of what may  
 19 be their only opportunity to challenge the [rule] on a nationwide, programmatic basis”); *Kern v.*  
 20 *U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071 (9th Cir. 2002) (“Because the plaintiffs here  
 21

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22 <sup>8</sup> The cases cited by Defendants are readily distinguishable. *Clapper v. Amnesty Int’l USA*, 133 S.  
 23 Ct. 1138 (2013) implicated no procedural injury claim but, rather, involved a substantive  
 24 challenge to government surveillance activities resting on a “highly attenuated chain of  
 25 possibilities.” *Id.* at 1147. In *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the only  
 26 individual who submitted a declaration specifying how a Forest Service regulation that limited  
 27 public involvement might affect his concrete interests – which the government conceded “*was*  
 28 sufficient to establish Article III standing” – had “settled” his claims, thus eliminating the “injury  
 in fact” that would have supported the asserted procedural injury, *id.* at 494 (emphasis added).  
 And in *Wilderness Society v. Rey*, 622 F.3d 1251 (9th Cir. 2010), the only individual who had  
 submitted a declaration could assert only “[p]ast injury” and did “not allege that his future  
 enjoyment [was] in any way threatened” by the agency action, *id.* at 1256-57.



bring a NEPA challenge to an EIS . . . they are able to show an imminence of harm to the plaintiffs”).<sup>9</sup>

**C. ABC Also Has Organizational Standing In Its Own Right**

Although the procedural injury asserted by the individual Plaintiffs and by ABC on behalf of its members makes it unnecessary for the Court to go any further in its standing analysis, ABC’s Declaration establishes another, distinct injury. In addition to suing on behalf of its members, an organization may have standing to sue “in its own right.” *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Where an organization is compelled to expend resources to counteract the allegedly unlawful practices of the defendant, “[s]uch concrete and demonstrable injury to the organization’s activities – with the consequent drain on the organization’s resources – constitutes far more than simply a setback to the organization’s abstract social interests.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding that an equal opportunity housing organization had standing to challenge discriminatory housing practices because the organization alleged that the practices “perceptibly impaired [the organization’s] ability to provide counseling and referral services for low- and moderate-income homeseekers”).

The Ninth Circuit has “interpreted *Havens* to stand for the proposition that an organization may satisfy the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) “diversion of its resources to combat” the allegedly unlawful conduct. *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). Accordingly, while an organization does not have standing merely by “incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization

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<sup>9</sup> Although Defendants have framed their challenge as one to standing instead of ripeness, “[s]tanding and ripeness boil down to the same question in this case,” *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 n.8 (2007), i.e., whether, in a case predicated on a procedural violation, plaintiffs with a concrete interest can sue at the time the violation occurs. Accordingly, Circuit precedents finding such challenges to be ripe for adjudication have a direct bearing. See *Mont. Env’tl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014) (“[W]e have previously recognized that ‘in many cases, ripeness coincides squarely with standing’s injury in fact prong.’ . . . Regardless of whether we use verbal formulations developed for standing or the ones developed for ripeness, our analysis is materially unchanged.”) (quoting *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)).

1 at all,” the organization *does* have standing when a governmental policy impedes the  
 2 organization’s ability to carry out its core mission and diverts resources that otherwise would have  
 3 been spent on other ways of carrying out that mission. *Valle Del Sol, Inc. v. Whiting*, 732 F.3d  
 4 1006, 1018-19 (9th Cir. 2013) (internal quotation omitted).<sup>10</sup>

5 ABC’s Declaration establishes *Havens* standing. It states that “ABC is the only United-  
 6 States based group with a major focus on bird habitat conservation throughout North and South  
 7 America,” and that ABC works to reduce threats to birds from myriad impacts “through scientific  
 8 research and analysis; advocating for bird conservation at the local, state, and federal levels;  
 9 forming bird conservation partnerships; and pressing for regulatory changes to address such  
 10 threats effectively.” ECF No. 52-2 ¶ 1. ABC has a “Bird-Smart Wind Program” that  
 11 “recognize[s] that ‘bird-smart’ wind energy is an important part of the solution to climate change,”  
 12 but seeks to “ensur[e] that such development occurs in a manner that does not needlessly place  
 13 bird populations at risk.” *Id.* ¶ 2. A key element of that program “is to ensure that that the FWS  
 14 develops effective measures for overseeing the siting, construction, and operation of wind  
 15 facilities in a manner that avoids and minimizes adverse impacts to the extent practicable.” *Id.*

16 As detailed in ABC’s Declaration, the thirty-year take rule’s adoption in violation of  
 17 NEPA and the ESA undermines the organization’s bird conservation mission, and specifically its  
 18 wind program. The Declaration explains that “ABC and other members of the public who do not  
 19 work for the federal government or wind power companies, have tremendous expertise that can  
 20 and should be brought to bear on whether BGEPA permits should be maintained, modified, or  
 21 revoked in appropriate circumstances,” but by “limiting long-term permit reviews to internal  
 22 \_\_\_\_\_

23 <sup>10</sup> See also *Whiting*, 732 F.3d at 1018-19 (an organization that provided services to undocumented  
 24 aliens had standing to challenge a state statute that allegedly interfered with the organization’s  
 25 ability to provide those services); *El Dorado Estates v. City of Fillmore*, 765 F.3d 1118, 1121-22  
 26 (9th Cir. 2014) (applying *Havens* to hold that an organization seeking to establish housing for  
 27 seniors had standing to seek relief from a city’s allegedly unlawful interference with that  
 28 objective); cf. *Animal Legal Def. Fund v. The Great Bull, LLC*, No. 14-cv-01171-MEJ, 2014 WL  
 2568685, at \*4 (N.D. Cal. June 6, 2014) (finding that animal protection organizations had standing  
 to challenge allegedly unlawful rodeo practices because the organizations had to divert “resources  
 not only in response to Defendants’ activities but also to counteract the effect these events have on  
 Plaintiffs’ own outreach and education efforts designed to prevent animal cruelty”).

1 assessments by FWS personnel, the inevitable result is that eagles and eagle populations of  
 2 concern and interest to ABC and its members will be harmed . . . .” *Id.* ¶¶ 10, 11.

3 In addition, the rule’s jettisoning of public project reviews that, under the 2009 rule, had to  
 4 be conducted in connection with renewal applications at least every five years and afforded an  
 5 opportunity for public involvement through the NEPA process, “not only eliminates essential  
 6 procedural safeguards but also harms ABC’s organizational interests by necessitating ABC’s  
 7 expenditure of significant financial and other resources in order to . . . attempt to learn the status of  
 8 the Service’s internal project reviews.” *Id.* ¶ 8 (emphasis added); *see also id.* ¶ 10 (the substitution  
 9 of internal reviews for public renewal proceedings “will require a significant expenditure of time,  
 10 resources, and personnel for ABC even to attempt to compensate for the serious deprivation of  
 11 information occasioned by the rule”). Consequently, the “rule will both seriously compromise  
 12 ABC’s institutional efforts to advance the protection of eagles and compel ABC to spend its  
 13 limited resources attempting to compensate for the deprivation of information that will result  
 14 directly from the rule’s adoption.” *Id.* (emphasis added). In addition to procedural injury,  
 15 therefore, this case *also* presents a classic example of *Havens* standing predicated on the rule’s  
 16 direct interference with the organization’s ability to carry out its bird conservation mission.<sup>11</sup>

## 17 **II. THE FWS VIOLATED NEPA BY INVOKING A CATEGORICAL EXCLUSION** 18 **FOR A RULE CHANGE DESIGNED TO IMPACT THE ENVIRONMENT.**

### 19 **A. The FWS Must Take A “Hard Look” At The Rule’s Impacts.**

20 Agency action expressly designed to have an impact on the environment – such as the  
 21 thirty-year take rule – cannot be immunized from NEPA review. Pl. Mem. at 14-16. Moreover,  
 22 as the Ninth Circuit held in *Kraayenbrink*, a regulation that reduces public involvement in agency  
 23 decisions affecting natural resources and wildlife must be analyzed in a NEPA document to satisfy  
 24 NEPA’s “hard look” requirement. *Id.* at 16-17.

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 26 <sup>11</sup> *Havens* standing (which is not addressed in Defendants’ brief) is *not* the same as “[m]ere  
 27 informational injury,” Def. Mem. at 13; thus, Plaintiffs are *not* basing any of their standing  
 28 arguments simply on the deprivation of information that will flow from the rule, notwithstanding  
 Defendants’ misplaced effort to cast Plaintiffs’ standing allegations in those terms, *id.*

1 Defendants appear to acknowledge that Plaintiffs' argument would have been valid if the  
2 FWS had adopted the thirty-year take rule *as proposed*, but Defendants contend that the Service  
3 somehow dramatically improved the rule – from the standpoint of eagle protection and public  
4 involvement – when it was adopted in final form, so that Plaintiffs “offer false criticisms that no  
5 longer apply.” Def. Mem. at 1; *id.* at 15 (“Plaintiffs’ quarrel seems to be with the [thirty-year take  
6 rule] as originally proposed, not with the final Amendment”). This argument, however, is flatly  
7 contradicted by what the FWS told the public when it adopted the rule in final form.

8 When it promulgated the final rule, far from suggesting that it had made dramatic changes  
9 from the proposal, the FWS said just the opposite, stating that “[o]n April 13, 2012, we proposed  
10 to amend the regulations to provide for terms of up to 30 years” and that, “[i]n *today’s*  
11 *rulemaking, we are finalizing that proposal with minor modifications.*” AR 2 (emphasis added).  
12 Consequently, any notion that Defendants made major changes from the proposal that was  
13 lambasted by the FWS’s own BGEPA and NEPA experts, as well as the National Park Service,  
14 conservation groups, and Native American tribes – is nothing more than Defendants’ “*post hoc*  
15 rationalization” on which the Court, under basic administrative law precepts, may not rely.  
16 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971); *Humane Soc’y of U.S.*  
17 *v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) (refusing to sustain agency action based on the  
18 “*post hoc rationalizations* offered by defendants” in their briefs”). If anything, by incorporating  
19 the concept of “experimental” Advanced Conservation Practices (“ACPs”) as a *further*  
20 accommodation to the wind industry – which was not mentioned in the proposed rule – the final  
21 rule is even riskier for eagle populations than the proposal and therefore even more in need of the  
22 “hard look” that NEPA requires. *See* Pl. Mem. at 12, 22-23.

23 More important, the “minor modifications” made in the final rule have nothing whatsoever  
24 to do with whether the effects of the rule should be subjected to NEPA review. In this connection,  
25 Defendants’ contention that, as finally issued, the thirty-year take rule “differs from the original  
26 Take Rule only in procedure,” Def. Mem. at 15, is both disingenuous and demonstrably incorrect.  
27 It is disingenuous because if the thirty-year take rule was in fact functionally identical to the  
28 system it replaced, then the wind power industry would not have spent time and resources  
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1 advocating for its adoption; it would not have the stated objectives of “facilitat[ing] the  
 2 development of renewable energy and other projects” in eagle habitat and “provid[ing] more  
 3 certainty to project proponents and their funding sources,” AR 18; and AWEA would not have  
 4 intervened in this Court on the grounds that, in fact, the new rule “materially decreased the  
 5 uncertainty facing wind energy facilities that may occasionally result in eagle fatalities,” and  
 6 “*gives developers more long-term certainty* that a wind energy facility will retain permit  
 7 authorization throughout its serviceable life” irrespective of its impact on eagles. ECF No. 33-1 at  
 8 ¶ 9 (emphasis added).

9 As the final rule makes clear and the wind power industry has conceded, the two systems  
 10 do not, in fact, differ “only in procedure.” In fact, a system under which permits may be issued for  
 11 thirty years, providing for only internal agency reviews during the lengthy permit term, is  
 12 *fundamentally* different than a system under which permits could last a maximum of five years  
 13 and then had to be *affirmatively renewed through a new agency decision at least every five years*.  
 14 Most important, as the very cases cited by Defendants make clear, an affirmative agency decision  
 15 to *renew* a permit – as was required under the 2009 rule – is an affirmative “agency action” that  
 16 triggers the Service’s duty to comply with NEPA (and its public participation requirements), as  
 17 well as an opportunity for *judicial review* of every agency decision to renew the permit. *See*  
 18 *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (explaining that an agency’s obligation  
 19 to comply with NEPA is “triggered by a discretionary federal *action*”) (emphasis added). In stark  
 20 contrast, the thirty-year take rule’s provision for purely *internal* “evaluations” of *previously issued*  
 21 *long-term permits*, AR 3, does *not* require any agency action triggering NEPA compliance or even  
 22 any opportunity for judicial review of the Service’s compliance with NEPA. *Id.* (“governmental  
 23 inaction does not trigger NEPA”) (citing *Alaska v. Andrus*, 591 F.2d 537, 540-41 (9th Cir. 1979)).  
 24 That is *why* the FWS substituted such reviews for affirmative renewal decisions, and why the  
 25 thirty-year take rule affords far more “long-term certainty for project proponents . . . .” AR 7.<sup>12</sup>

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27 <sup>12</sup> This legal and practical reality is in no way ameliorated by the “minor modifications” made in  
 28 the final rule. The rule provides that the FWS will, in some unspecified manner and at some  
 (footnote continued)

Defendants’ contention that the public’s participatory rights are not lessened under the thirty-year take rule because the agency’s renewal determinations under the five-year rule “did not necessarily require much in the way of additional NEPA analysis or public involvement,” Def. Mem. at 15 (emphasis added), is another impermissible *post hoc* rationalization. When the FWS adopted the final rule, in response to public comments that a “30-year permit would decrease opportunities for public stakeholder involvement because decisions on issuance and reissuance are subject to NEPA analysis and tribal consultation,” the FWS *conceded* that “[I]eaving the 5-year maximum permit term in place **would have allowed for additional public and Tribal comment during the NEPA process for each of the multiple permit applications the Service would have evaluated for the an activity expected to last decades.**” AR 6 (emphasis added); *see also Los Padres Forestwatch v. U.S. Forest Serv.*, 776 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011) (Koh, J.) (the CEQ regulations “requir[e] all federal agencies to ‘[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures’”) (quoting 40 C.F.R. § 1506.6). Thus, the FWS candidly *admitted* that the rule would reduce opportunities for public involvement in agency decisions and accompanying NEPA reviews; the agency simply asserted that this policy change was justified because it would help further the “central objective of this regulation . . . to provide more certainty to project developers for the operational life of a project.” AR 6.

The FWS’s belief that sacrificing public involvement “strike[s] a good balance” from a policy perspective, *id.*, does not relieve of the Service of its duty to analyze the environmental implications of that major policy choice (and alternatives to it) in a NEPA document. *Kraayenbrink* makes this crystal clear. *See* 632 F.3d at 492 (“While diplomacy with permittees or lessees of public rangelands is certainly a worthy goal, it is no substitute for the Bureau of Land

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unspecified time, make “available to the public” *raw data* on eagle fatalities compiled by permittees, AR 22, but the rule makes no provision for what the public can *do* with that data and, in particular, creates no mechanism for the public to participate in the Service’s internal “review[s]” of whether to modify or revoke a previously issued permit. *Id.* And while the FWS could, in theory, revoke a BGEPA permit – a power that the Service has with regard to all permits it issues, *see* 50 C.F.R. § 13.28 – that hardly negates the value of public participation in, and the opportunity to obtain judicial review of, the FWS’s affirmative permit renewal decisions.



1 Management's ["BLM"] obligations to comply with NEPA."'). Indeed, *Kraayenbrink* is squarely  
 2 controlling here, since one of the specific ways in which public participation was lessened by the  
 3 regulation at issue in that case concerned the process for *renewing* grazing permits. *See id.* at 480  
 4 (explaining that, "under the 2006 Regulations, the BLM is no longer required to involve interested  
 5 members of the public when . . . *renewing an individual grazing permit*") (emphasis added).  
 6 Consequently, in view of the Court of Appeals' finding of a NEPA violation where BLM  
 7 *prepared an EIS* but nonetheless failed to take a "hard look" at the environmental effects  
 8 associated with the "reduction in public involvement in management of grazing," the necessary  
 9 conclusion here is that the FWS has flagrantly violated NEPA by preparing no NEPA document at  
 10 all in connection with a rule change that likewise effectuates an "across-the-board reduction in  
 11 public involvement" in long-term programmatic authorizations to kill or otherwise take bald and  
 12 golden eagles. *Id.* at 492.<sup>13</sup>

13 Yet another significant legal difference is that under the system requiring affirmative  
 14 renewal decisions at least every five years, the entity seeking ongoing permission to kill eagles had  
 15 the affirmative burden of demonstrating that all criteria for "issuance" of a permit in the first  
 16

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17 <sup>13</sup> In attempting to distinguish *Kraayenbrink*, Defendants assert that, here, the "public would  
 18 certainly be involved in the *initial* decision to issue a site-specific programmatic take permit," and  
 19 would also "be involved *if* a five-year review of information – made publicly available – resulted  
 20 in the need for a significant permit amendment." Def. Mem. at 15 (emphasis added). To the  
 21 extent that this argument implies that the FWS will even make available to the public the agency's  
 22 internal "five-year review[s] of information," it is misleading. The final rule merely says that the  
 23 Service will make available to the public "*eagle mortality information from annual reports*"  
 24 submitted by permittees and "*eagle-mortality information compiled in five-year review reports*,"  
 25 AR 22 (emphasis added), i.e., the public will apparently obtain the compiled *raw numbers* of eagle  
 26 deaths as reflected in the permittees' own monitoring reports. The rule makes no mention of  
 27 providing the FWS's *analysis* of the mortality data, or the basis for any determination by the  
 28 agency as to whether additional conservation measures are necessary in light of the data, or  
 whether a permit should otherwise be modified or revoked in view of new information (such as  
 evidence of declining eagle populations). In addition, Defendants' statement that the public may  
 become involved only "*if*" the FWS decides that there is a "need for a significant permit  
 amendment," Def. Mem. at 15 (emphasis added), concedes that the public will *not* be involved at  
 all when the Service determines, for whatever reason, to leave a previously issued permit intact (or  
 simply fails to address the matter one way or the other). But the situations in which conservation  
 groups, Native-American tribes, or other members of the public *may disagree with the FWS's*  
*assessment* of the impact of a permitted activity, whether the activity should be continued, and, if  
 so, on what terms, are the very ones requiring public involvement.

instance continued to be met in light of the available information. AR 7 (“Renewal of a permit is an issuance of a permit, and all issuance criteria must be met.”). The thirty-year take rule imposes no such obligation on the permit holder for the continuation of a previously issued long-term permit. To the contrary, in adopting the final rule, the Service stated that its amendment of a long-term permit following an internal review had to be “*consistent with the limits jointly agreed to at the outset of each permit.*” AR 2 (emphasis added); *see also* AR 4779 (Oct. 3, 2012 e-mail from rule’s principal author) (“[T]his decision makes the effects [of] 30-year permits *significantly different than multiple 5-year permits that are held to the standard of implementing all potentially effective measures each time the permit is renewed.*”) (emphasis added). The bottom line is that a thirty-year permit rule deliberately crafted to afford “long-term certainty for project proponents,” AR 7, is vastly different from the five-year permit renewal system, and those differences must be analyzed in a NEPA document under Circuit precedent.

**B. The CE Invoked By The FWS Does Not Apply.**

Where, as here, a rule change is *intended* to have a significant impact on the environment, FWS’s invocation of a CE must be rejected because CEs are “limited to ‘situations where there is an insignificant or minor effect on the environment.’” *Los Padres Forestwatch*, 776 F. Supp. 2d at 1044 (quoting *Alaska Ctr. for the Env’t v. U.S. Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999)). The thirty-year take rule is explicitly intended to foster wind energy projects in areas occupied by eagles with the understanding that eagles will necessarily be killed (and otherwise “taken”) as a result. The Service predicts that it could issue at least *1100* thirty-year permits under the rule, most of which will be for wind power projects. *See* Pl. Mem. at 19 n.10. That should be the end of the matter, for many hundreds of industrial wind projects operating many thousands of turbines in eagle habitat is more than an “insignificant or minor effect on the environment.”

In any case, Defendants have failed to justify resort to the specific CE invoked here – which requires both that the environmental effects of the rule are “too broad, speculative, or conjectural to lend themselves to meaningful analysis,” *and* that those effects “will later be subjected to the NEPA process,” 43 C.F.R. § 46.210(i). Defendants assert that the effects of the thirty-year take rule are “purely conjectural,” Def. Mem. at 15, and cannot be “projected in a Plaintiffs’ Opposition to Federal Defendants’ Motion for Summary Judgment, Civ. No. 5:14-cv-02830-LHK



1 meaningful way,” *id.* at 14, although, in adopting the final rule, the FWS itself made both general  
 2 and specific projections concerning the rule’s effects. Thus, the FWS projected that the longer  
 3 permit term “*will facilitate* the development of renewable energy and other projects that are  
 4 designed to be in operation for many decades” in eagle habitat, AR 18 (emphasis added), and that  
 5 “[u]tility-scale wind energy facilities and electric transmission companies *are likely to be the*  
 6 *most frequent programmatic permit applicants, because of the known risk to eagles* from  
 7 collisions with wind turbines and electrocution of power lines,” AR 17 (emphasis added).

8 In addition, in complying with other statutory requirements – such as the Paperwork  
 9 Reduction Act, 44 U.S.C. §§ 3501-3521 – the FWS also made specific predictions as to the  
 10 number of long-term permits that would be issued under the rule. *See, e.g.*, AR 6644 (predicting  
 11 that the FWS “could issue 1,108 30-year permits,” the “majority” of which “will be in the wind  
 12 energy production business”); *see also* Pl. Mem. at 19 n.10. Especially since it was feasible for  
 13 the FWS to make those general and specific predictions, the agency was also required to take the  
 14 “hard look” at potential environmental impacts (and alternatives) that is mandated by NEPA,  
 15 which Congress directed must be complied with “*to the fullest extent possible.*” 42 U.S.C. § 4332  
 16 (emphasis added). This is especially so given the indisputable impact of the rule change on public  
 17 involvement opportunities – an issue that *Kraayenbrink* specifically instructs must be analyzed in  
 18 a NEPA document – and the final rule’s incorporation of other elements with far-reaching  
 19 environmental implications, i.e., the use of “experimental,” untested ACPs for the wind industry  
 20 specifically. *See* Pl. Mem. at 19 & n.10.

21 Defendants do not dispute that they have performed NEPA reviews in connection with  
 22 other broad regulations and programmatic decision documents, although those also necessarily  
 23 entailed impacts that, while potentially significant, “may be uncertain and difficult to quantify.”  
 24 *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1098 (9th Cir. 2011). Most  
 25 relevant, Defendants were able to prepare an extensive EA on the 2009 BGEPA regulations, in  
 26 which the five-year permit term was established, confirming that it is entirely feasible for the  
 27 Service to engage in such a NEPA analysis when it wishes to do so. *See* Pl. Mem. at 18-19.

Defendants’ only answer – that the “original Take Rule reflected potential on-the-ground differences between a variety of alternatives,” Def. Mem. at 15 n.5 – misses the mark since the final thirty-year take rule itself points to “potential on-the-ground differences” between a rule change that is expressly designed to “facilitate the development of renewable energy and other projects” through the provision of extremely long-term permits, AR 18, and alternative means of implementing BGEPA (such as leaving the prior system in place). A central function of NEPA – which Defendants have undermined by refusing to prepare an EIS or even an EA – is to ensure that agencies “study, develop, and describe appropriate alternatives to recommended courses of action . . . .” 42 U.S.C. § 4332(E). Accordingly, Defendants have no plausible argument that the FWS is unable to engage in *any* “meaningful analysis” of the rule’s potential effects and alternatives that might avoid or minimize those effects. 43 C.F.R. § 46.210(i).<sup>14</sup>

Nor can Defendants satisfy the second, independent requirement of the CE, since it is apparent that the cumulative effects *of the rule itself*, as well as alternatives to it, will not “later be subject to the NEPA process, either collectively or case-by-case.” 43 C.F.R. § 46.210(i). Defendants’ contention that the FWS will somehow examine overall “cumulative impacts at the site-specific level,” Def. Mem. at 16, is an oxymoron. There is no conceivable way in which a “site-specific” consideration of a particular wind power or other project will adequately substitute for a nationwide or even regional cumulative-effects analysis of how a rule change designed to “facilitate the development of renewable energy and other projects” in eagle habitat, AR 18, will potentially affect eagles, eagle populations, and other wildlife *throughout the country*. Consequently, this case in fact closely parallels *California Wilderness Coalition v. U.S. Dep’t of*

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<sup>14</sup> Since Plaintiffs’ opening brief was filed, the FWS has announced that it is “preparing an environmental impact statement” in connection with still another rulemaking that will require the FWS to address the broad programmatic effects of a potential rule change on eagles and other migratory birds. 80 Fed. Reg. 30032 (May 26, 2015). Specifically, the FWS announced that it is “considering rulemaking to address various approaches to regulating incidental take of migratory birds,” *id.* at 30032-33, pursuant to the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, and that it is embarking on preparation of an EIS in connection with that undertaking. Once again, therefore, it is evident that the FWS can engage in “meaningful” NEPA analyses of broad programmatic initiatives when it desires to do so.

1 *Energy*, in which the Ninth Circuit held that the cumulative “programmatic effects” of an agency  
 2 decision designed to “encourage” the siting of transmission facilities were “subject to review for  
 3 environmental impacts at th[e] time” the programmatic decision was made, “or not at all.” 631  
 4 F.3d at 1103.<sup>15</sup>

5 **C. “Extraordinary Circumstances” Preclude Invocation Of A CE**

6 Federal Defendants acknowledge that “certain types of ‘extraordinary circumstances’ may  
 7 prevent reliance on a [CE].” Def. Mem. at 17. They maintain, however, that no such  
 8 circumstances are present, “as FWS explained in the final *Tenure Amendment*.” Def. Mem. at 17  
 9 (emphasis added). There are several fatal flaws in that response.

10 To begin with, the FWS did *not* “explain” in the final rule why extraordinary  
 11 circumstances are not present here. Rather, the Service merely *listed* the four extraordinary  
 12 circumstances that commenters said applied and on which Plaintiffs also rely, and then simply  
 13 stated that “[w]e have found that none apply to this final rule.” AR 11. That was the extent of the  
 14 agency’s “explanation.” Accordingly, *every* argument about extraordinary circumstances is a *post*  
 15 *hoc* rationalization on which the Court may not rely. *California v. Norton*, 311 F.3d 1162, 1177  
 16 (9th Cir. 2002) (where “there is substantial evidence in the record that exceptions to the  
 17 categorical exclusions *may* apply, *the agency must at the very least explain why the action does*  
 18 *not fall within one of the exceptions*”) (emphasis added).

19 There is, however, no need for the Court to remand for the FWS to proffer its own  
 20 explanation. Where, as in this case, the presence of one or more extraordinary circumstances is  
 21 “beyond doubt,” *id.*, the Court should hold that a CE may not be invoked. First, as for whether the  
 22 rule has “highly controversial environmental effects,” 43 C.F.R. § 46.215(c), Defendants reiterate

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24 <sup>15</sup> Further, any NEPA review on the *application* of the rule in a site-specific context cannot  
 25 possibly serve NEPA’s core function of informing the FWS’s determination of whether the  
 26 programmatic approach embodied in the thirty-year take rule should be adopted in the first  
 27 instance. As this Court has recognized, “post-hoc consideration of information and data ‘would  
 28 frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies take a ‘hard  
 look’ at the environmental consequences of their actions, *early enough so that it can serve as a*  
*contribution to the decisionmaking process.*” *Los Padres Forestwatch*, 776 F. Supp. 2d at 1050  
 (emphasis in original; internal quotation omitted).

1 their erroneous theme that the final rule changed dramatically from the proposal, and contend that  
 2 the myriad “concerns” raised by NPS’s own experts, the National Park Service, conservation  
 3 groups, and Native American tribes were all adequately “addressed.” Def. Mem. at 18.  
 4 Defendants cite nothing from the record to support that assertion, and it is insupportable. The  
 5 final rule stated that only “minor modifications” had been made to the proposal that drew scathing  
 6 criticism, AR 2, and the record confirms that those outside the FWS (except for the wind power  
 7 industry), as well as the agency’s own in-house experts, remained deeply concerned about the  
 8 impacts of the final rule.<sup>16</sup>

9 Second, with regard to whether the rule will have “highly uncertain” effects, 43 C.F.R. §  
 10 46.215(d) – which the final rule as much as concedes, *see* Pl. Mem. at 22 – Defendants contend  
 11 that Plaintiffs’ “disagreement is with the Agency’s Adaptive Management Process,” which is an  
 12 “outgrowth of the *original Take Rule*, which Plaintiffs have not challenged.” Def. Mem. at 18-19  
 13 (emphasis added). This *post hoc* explanation stands the original rule on its head. Notwithstanding  
 14 “adaptive management,” the 2009 rule established a *five-year* limit for programmatic permits  
 15 precisely “because factors may change over a longer period of time ***such that a take authorized***  
 16 ***much earlier would later be incompatible with the preservation of the bald eagle or the golden***  
 17 ***eagle.***” AR 62 (emphasis added). The “original Take Rule,” therefore, reinforces that a regulation  
 18 authorizing take permits for thirty years has “highly uncertain” effects that, at minimum, must be  
 19 afforded a “hard look” in a NEPA document.

20 Third, Defendants misstate Plaintiffs’ argument concerning the rule’s establishment of a  
 21 “precedent for future action,” 43 C.F.R. § 46.215(e). Plaintiffs’ brief said nothing about the  
 22 “Agency’s Adaptive Management Process” as a whole establishing a precedent. Def. Mem. at 19.

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23  
 24 <sup>16</sup> *See, e.g.*, AR 3132 (Briefing Memo from the FWS Director to the Deputy Secretary of the  
 25 Interior) (“[T]he environmental community has adamantly opposed the Department/Service  
 26 *promulgating the final rule* to extend the permit duration up to 30 years”) (emphasis added); AR  
 27 2968 (Apr. 2, 2013 e-mail by rule’s principal author) (criticizing the five-year reviews on the  
 28 grounds that “I’m really worried that we are setting ourselves up with a framework that our agency  
 does not have the resources to implement”). The *amicus* brief filed by the Inter Tribal Association  
 of Arizona confirms that the final rule continues to be highly controversial in the Native American  
 community. *See* ECF No. 60.

1 Rather, Plaintiffs specifically argued that the thirty-year rule’s incorporation of “experimental,”  
 2 unproven ACPs so as to allow the wind power industry to obtain long-term permits *explicitly*  
 3 established a dangerous precedent on which other industries may rely. *See* Pl. Mem. 22-23.<sup>17</sup>

4 Fourth, as to whether the rule may have impacts on “historic or cultural resources,”  
 5 “parks,” “migratory birds,” and other “historic or cultural resources,” 43 C.F.R. § 46.215(b),  
 6 Defendants say nothing about the warning by the FWS’s sister agency, the National Park Service,  
 7 that the rule jeopardizes eagle populations that reside in national parks and migratory corridors.  
 8 *See* Pl. Mem. at 23. Instead, Defendants make the astonishing assertion that eagles “cannot be  
 9 considered ‘cultural or historical’ resources,” Def. Mem. at 19, although the FWS itself has  
 10 declared that “[o]f all America’s wildlife, eagles hold perhaps the *most revered place in our*  
 11 *national history and culture.*” AR 10372 (emphasis added). More significantly, Congress enacted  
 12 BGEPA because the “‘bald eagle is [not] a mere bird of biological interest *but a symbol of the*  
 13 *American ideals of freedom,*’” *United States v. Vasquez-Ramos*, 531 F.3d 987, 991 (9th Cir. 2008)  
 14 (emphasis added) (quoting 54 Stat. 250 (1940)), and because the golden eagle is “an important  
 15 part of the ceremonies and religion of many Indian tribes.” *United States v. Dion*, 476 U.S. 734,  
 16 742 (1986).

17 In sum, although only one “extraordinary circumstance” need exist to preclude invocation  
 18 of a CE, in this case at least four such circumstances are present. The Court must reject the CE.<sup>18</sup>  
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22 <sup>17</sup> The FWS’s “Eagle Conservation Plan Guidance,” issued in April 2013, refers to the use of  
 23 “experimental” ACPs by the wind industry. *See* AR 10375. However, compliance with that  
 24 guidance document was purely “voluntary,” AR 10372, and it was also not subjected to any NEPA  
 25 review. The thirty-year take rule represents the first time that the concept of experimental ACPs  
 has been incorporated into a formal regulation and the first time that the FWS explicitly stated that  
 the wind industry’s reliance on it could afford a precedent “for other industries.” AR 3.

26 <sup>18</sup> Plaintiffs have not “abandoned” their claim that the rule conflicts with BGEPA. Def. Mem. at  
 27 20. Rather, consistent with Circuit precedent, Plaintiffs explained that since NEPA review (as  
 28 well as section 7 consultation) is so clearly called for here and may well lead to changes in the  
 rule (and will at the very least change the record for review), the Court need not address this  
 additional basis for setting aside the rule at this time. *See* Pl. Mem. at 25 n.15.

### 1 **III. THE FWS VIOLATED SECTION 7 OF THE ESA.**

2 Defendants acknowledge that the “threshold for a ‘may affect’ finding” sufficient to trigger  
 3 ESA section 7 consultation is “relatively low,” Def. Mem. at 21, but Defendants offer two  
 4 groundless reasons for why it is not satisfied here. First, Defendants assert that “Plaintiffs have  
 5 made no showing whatsoever that promulgating the Tenure Amendment will cause an actual  
 6 project to be built,” Def. Mem. at 21, although, yet again, the rule *itself* states that “this change  
 7 will facilitate the development of renewable energy and other projects” in eagle habitat, AR 18;  
 8 *see also* ECF No. 33-1 ¶¶ 6, 7 (AWEA’s sworn Declaration stating that the rule is “necessary for  
 9 the future of wind energy development” in areas occupied by eagles). Further, the FWS’s own  
 10 recent ESA listing decisions recognize that widespread wind power development may affect a  
 11 number of species protected by the ESA.<sup>19</sup>

12 Accordingly, the notion that a rule expressly designed to facilitate the broad expansion of  
 13 industrial wind power will have no effect whatsoever on any ESA-listed species defies credulity  
 14 and is certainly not supported by anything in the record before the Court. *See* FWS, Endangered  
 15 Species Consultation Handbook (March 1998), at xvi (excerpt attached as Ex. G) (emphasizing  
 16 that the “may affect” standard for triggering section 7 consultation is satisfied “when a proposed  
 17 action may pose **any** effects on listed species or designated critical habitat”) (emphasis in  
 18 original)<sup>20</sup>; 80 Fed. Reg. 26832, 26833 (May 11, 2015) (“framework programmatic actions” that  
 19  
 20

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21 <sup>19</sup> *See, e.g.*, 79 Fed. Reg. 69192, 69259 (Nov. 20, 2014) (“Sage-grouse could be killed by flying  
 22 into turbine rotors or towers” and “Sage-grouse populations are impacted by the . . . loss of habitat  
 23 and behavioral avoidance of the wind turbines”); 79 Fed. Reg. 73706, 73713 (Dec. 11, 2014)  
 24 (“[W]ind energy development, especially near the coasts, may cause some unquantifiable amount  
 25 of red knot mortality into the foreseeable future . . . .”); 79 Fed. Reg. 19974, 19984 (April 10,  
 26 2014) (“[A] single commercial-scale wind turbine creates a habitat avoidance zone for the greater  
 27 prairie-chicken that extends as far as 1.6 km (1 mi) from the structure.”); 80 Fed. Reg. 17974,  
 28 18002 (April 2, 2015) (“[s]ustained annual mortality of individual northern long-eared bats at a  
 particular wind facility could result in impacts to local populations.”).

<sup>20</sup> Although the Consultation Handbook is not in the administrative record, the government has  
 cited it. *See* Def. Mem. at 5. Plaintiffs agree that the Handbook represents an official FWS  
 interpretation of its section 7 consultation obligations, and hence the Court may take judicial  
 notice of it.



1 “establishes a framework for the development of specific future action[s]” that may in turn affect  
 2 listed species are subject to the “duty to consult under section 7(a)(2)”.

3 Second, Defendants contend that the “FWS has no statutory authority under the BGEPA to  
 4 authorize, fund, or carry out construction of wind facilities, and thus the [thirty-year take rule]  
 5 cannot be considered the legally relevant cause” of any “effects on ESA-listed species from those  
 6 activities.” Def. Mem. at 22. If this convoluted argument had any validity, it would mean that the  
 7 FWS would not even conduct section 7 consultations on *individual* BGEPA permits, thus  
 8 contradicting what the FWS said in the final rule, *see* AR 19 (“consultation under ESA Section 7  
 9 may be required prior to issuance of a permit”). In any case, the argument is baseless. Under the  
 10 ESA implementing regulations, section 7 consultation must be conducted on all agency “actions,”  
 11 which are defined broadly to encompass “all actions or programs of any kind authorized, funded,  
 12 or carried out, in whole or in part, by Federal agencies,” including, specifically, the “*promulgation*  
 13 *of regulations.*” 50 C.F.R. § 402.02 (emphasis added); *see also Pac. Rivers v. Thomas*, 30 F.2d  
 14 1050, 1054 (9th Cir. 1994) (“[T]here is little doubt that Congress intended to enact a broad  
 15 definition of agency action in the ESA.”).

16 As the en banc Court of Appeals has held, therefore, section 7 consultation is required for  
 17 “*any discretionary action* that may affect a listed species or critical habitat.” *Karuk Tribe of Cal.*,  
 18 681 F.3d at 1020 (emphasis added). Accordingly, in the cases cited by the government, the  
 19 agencies at issue lacked *any* “discretion to benefit protected species that fall under the ESA.” *Ctr.*  
 20 *for Biological Diversity v. U.S. Dep’t of HUD*, 541 F. Supp. 2d 1091, 1097 (D. Ariz. 2008). Here,  
 21 there is no possible argument that the FWS lacked discretion in issuing the thirty-year take rule,  
 22 nor is there any possible argument that the agency has no discretion to take ESA-listed species  
 23 impacts into account either in adopting that rule or in issuing individual BGEPA permits. The  
 24 FWS must comply with section 7.

### 25 CONCLUSION

26 For these reasons, the Court should set aside and remand the rule to the FWS.  
 27  
 28

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Caitlin Zittkowski, hereby certify that on June 15, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

I declare under penalty of perjury that the foregoing is true and correct.

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